MINORITY MEDIA AND TELECOMMUNICATIONS COUNCIL

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October 31, 2002

Hon. Marlene Dortch
Secretary
Federal Communications Commission
445 12th St. S.W., Suite TW-A325
Washington, D.C. 20554

Dear Ms. Dortch:

RE: Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies, MM Docket No. 98-204

MMTC, on behalf of 48 organizations that generally support the Commission's proposals in this proceeding ("EEO Supporters") respectfully responds to the October 28, 2002 letter filed on behalf of 49 state broadcast associations ("State Associations October 28 Letter") and the October 29, 2002 letter filed by the National Association of Broadcasters ("NAB October 29 Letter").

These 11th-hour letters are most notable for what they do not say. 1/

1/ The State Associations state that our October 1 letter was "wildly wrong in many respects." State Associations October 28 Letter, p. 1 Yet although the State Associations took four weeks to answer it, they could not point to a single specific error of fact in our October 1 letter.

At the June 24, 2002 en banc hearing, the State Associations' witness, Texas Association of Broadcasters President Ann Arnold, alleged that a petitioner to deny acted improperly "in an enforcement action in 1994" that involved a number of stations, Hearing Tr. 41. The only multiple station action pending in 1994 in Texas was the 1993 television petition to deny filed by the League of United Latin American Citizens. Nonetheless, without offering a statement from Ms. Arnold, the State Associations now maintain that she "questions whether MMTC's discussion of petitions filed by LULAC in fact relates to the particular instances of which she has been informed by member [sic] of her State Association." State Associations October 28 Letter, p. 4. If Ms. Arnold really had any competent evidence of eight-year old supposed misconduct, she obviously would have known which case it referred to. She now apparently admits that she did not even get that most basic fact right. Thus, her hearing testimony should be rejected because it was undocumented, uncorroborated and unreliable. We note, further, that the State Associations do not call into question a single representation made by LULAC counsel Eduardo Peña in his Declaration that described the 1993 Texas television EEO litigation, nor have the State Associations suggested that LULAC's routine 1993 civil rights case was not properly brought and fought.

In our Reply Comments, we documented the fact that out of the 837 job notices posted on the State Associations' website job pages, 348 (42%) went to the trouble of omitting the "EOE" tag line at the end. EEO Supporters Reply Comments, pp. 28-31. The "EOE" tag, used by every OFCCP-covered business since 1965, and by every broadcaster from 1971 through 2001, simply hold out to the public that the company soliciting job applications is an equal opportunity employer. Why would any firm not want to do that, and why would 42% of firms that used to do that want to stop? Yet in their witness' testimony at the June 24 en banc hearing, and in their subsequent ex parte letters, there was not a word of explanation -- let alone remorse. Instead, the State Associations and the NAB complained that we had not submitted proof that broadcasters discriminate. 2/

On October 1.2002. we supplied that proof. We provided the results of a landmark three-year, Ford Foundation-sponsored study by Alfred and Ruth Blumrosen (the "Blumrosens Study"), cited in the October 1,2002 ex parte letter of the EEO Supporters ("EEO Supporters October 1 Letter"). Among other things, the Blumrosens found that based on extreme statistical disparities (two standard deviations from the mean), the percentages of EEO-1 filing broadcasters who are presumed as a matter of law to be discriminating intentionally were:

- 15% against women
- 20% against African Americans
- 24% against Hispanics.

What the study reveals is that at least 15-24% of the largest firms in the industry employ minorities or women in such low numbers relative to the employment of qualified women and minorities in the same jobs, in the same industry, and the same market, that a prima facie case of discrimination would be made out which shifts the burden to them to rebut. 3/ In practice, relatively few firms with disparities this extreme have a non-gender related, non-race-related excuse for disparities that extreme. Thus, hundreds, perhaps thousands, of broadcast firms may be unqualified to hold Commission authorizations. 4/

To their credit, neither the State Associations nor the NAB attempted to discredit the Blumrosens Study or suggest that the Blumrosens' methodology was in any sense incorrect. 5/ The State Associations and the NAB must therefore be deemed to have waived any contention that the Commission cannot rely on the Blumrosens Study as competent evidence in this proceeding.

2/ See, e.g., State Associations' Reply Comments, p. 8 (maintaining that "neither the Commission nor [civil rights organizations] have produced, nor can they produce, any evidence of widespread discrimination in the broadcast industry *today* or in *the* recent *past* that would require special regulation and remedies to he imposed *today"* (emphasis in original)).

3/ Based on their analysis of the EEO-1 data, as well as their years of experience with forms of discrimination not measured in their study, the Blumrosens concluded that "we have reason to believe that the extent of intentional job discrimination may be at least double that which we have observed." Blumrosens Study, p. 12.

4/ See. e.g., Bilingual Bicultural Coalition on the Mass Media v. FCC, 595 F.2d 621, 630 (D.C. Cir. 1978) (intentional discrimination disqualifies an applicant for an FCC license.)

5/ The NAB asserts that notwithstanding the Blumrosens Study, "the Commission has never asserted that widespread discrimination [sic] in the broadcasting industry." NAB October 29 Letter, p. 2. Of course not: until it had the Blumrosens Study, the Commission didn't know how the extent to which discrimation in broadcasting really is widespread. Discriminators seldom advertise their lawlessness. See n. 13 infra.

The State Associations and the NAB have completely failed *to* grasp the moral force or the policy implications of the Blumrosens Study. The fair-minded thing for them to have done would have been to candidly acknowledge that hundreds or thousands of broadcasters appear to be violating the law, and state that while they may disagree about what kind of recruitment methods are necessary to prevent future law violations, they will cooperate fully with the Commission's efforts to root out, proscribe and prevent discrimination, and we would welcome the use of any and every kind of evidence probative of discrimination even as they oppose that evidence's use for other means.

The State Associations and the **NAB** said no such thing, however. Their filings contained not a single word that suggests that they are even mildly disturbed at what the Blumrosens found. Instead -- and in stark contrast to the NCTA, which enthusiastically supports the proposed new EEO rules -- the broadcast associations' only concern was that someone might actually bring discrimination complaints -- as if that were a bad thing.

Apart from obvious misreadings ofblack-letter civil rights law, 6/ the State Associations' and NAB's letters make eight points.

First, they suggest that the two standard deviations test in Teamsters is an "unconstitutional hiring quota." State Associations October **28** Letter, p. **3.** That is not the law, however. See Wygant v. Jackson Board of Education, **476** U.S. **267,292 (1987)** (O'Connor, J.) (justifying voluntary affirmative action where statistics were "sufficient to support a prima facie Title VII pattern or practice claim.")

Second, they categorically assert that civil rights organizations will use Form **395** data to "find stations whose reports show 'underrepresentation' of minorities by a statistical test, and that petitions to deny will then be filed against the licenses of those stations on the ground that they are 'intentional discriminators."' State Associations October **28** Letter, p. **2.** 7/ Plainly, it is premature to soothsay in the abstract what kind of allegations may be filed at an unknown future time against unknown broadcast applicants based on unknown future lawlessness. Perhaps new EEO rules will be respected and enforced sufficiently to prevent intentional discrimination, thereby obviating the

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6/ The State Associations are surprised that we would take "the position that any station that is lower by a statistical measure than the average number of minorities employed by broadcasters in its market is not merely engaging in discrimination (whether or not consciously) but may be presumed to be an *'intentional'* discriminator." State Associations Letter, p. **1.** That is not a "position" we took -- it is the law. The standard used in the Blumrosens Study is the "presumption that intentional discrimination is present when an establishment is more than two standard deviations below the average among its peers...an evidentiary principle designed by the Supreme Court to flush out 'clandestine and covert' intentional racial discrimination against minorities." Blumrosens Study, p. **35,** discussing Teamsters v. U.S., **431** U.S. **324** (1977). **At** this two standard deviation level, "there is **less** than once chance in twenty **(5%)** that it would have occurred by chance." Blumrosens Study, p. 43. Actually, "**90%** of the discriminating establishments were at least **2.5** standard deviations below the average utilization by their peers. This means that there were no more than one in 100 chances that the result was accidental." Id., p. **63.**

7/ See also **NAB** October **29** Letter, p. 2 ("MMTC admits that it intends to use station employment reports in precisely the way broadcasters have feared, that is, to complain that particular stations have not complied with the EEO rules.") That is false and irresponsible. The **NAB** cites to no such "admission", and neither MMTC (which does not file petitions to deny, as the **NAB** well knows), nor any other party, ever made any such "admission." Instead, we stated, clear as day, that civil rights organizations would not use Form **395** data to argue that "the station does not hire minorities; therefore, its recruitment efforts must be flawed." EEO Supporters October 1 Letter, p. 29. Obviously, those of the EEO Supporters that do civil rights adjudications would never refuse to use any competent evidence that a company violated the laws prohibiting race or gender discrimination. Id.

need for EEO adjudications. 8/ But it is not premature for civil rights organizations to say what they will not do: specifically, civil rights organizations' complaints will not, obviously, point to "underrepresentation" and on that basis assert that stations are "intentional discriminators." There are two reasons for this:

a. The two standard deviations Teamsters test, used by the federal courts and by the Blumrosens, is not based on mere "underrepresentation." It is based on a statistical anomaly so extreme as to make out a prima facie case of intentional discrimination. See, e.g., EEOC v. Shell Oil, 466 U.S. 54, 72 (1984) (opinion of O'Connor, J., joined by Burger, Rehnquist and Powell) (noting that it is "only in a comparison" between an employer's EEO-1 data and those of other, similarly situated employers "that a pattern of discrimination becomes apparent.") Mere "underrepresentation" is not enough. Instead, a party using statistics as one piece of evidence of discrimination must make the very difficult showing that the employment profile of a firm is extremely different -- two standard deviations away -- from the employment profiles of other firms in the same industry, market and job type, where the group being measured is female or minority persons known to have the qualifications to work in the job in question because they are employed in these jobs already.

b. Aggregate, industrywide statistical evidence can measure the propensity of firms in an entire industry to discriminate. The Commission has recognized that the ability to perform this kind of aggregate analysis is the primary reason for having Form 395 data. 9/ However, the courts and the FCC have always required more than statistical evidence. 10/ The FCC has never designated a case for hearing based only on statistical disparities, no matter how extreme that evidence may have been. 11/ The FCC has given no indication that it intends to change course in this respect. The kind of case in which statistical evidence is likely to be useful is one where there is extensive anecdotal evidence of discrimination, and the statistical record adds weight to the inference that the anecdotal evidence is reflective of a pattern of unlawful behavior. 12/

Third, the NAB suggests that even aggregate evidence of widespread discrimination, such as that found in the Blumrosens Study, "inevitably would pressure stations to hire minority or female candidates to avoid an FCC proceeding[.]" NAB October 29 Letter, p. 2. The NAB does not explain,

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8/ That underscores why judicial review of such EEO rules as might be adopted should be taken on an as-applied challenge rather than on the facial challenge that the State Associations are evidently contemplating. See State Associations' Reply Comments, p. 7 (threatening to seek "statutory or constitutional scrutiny and rejection" if meaningful EEO rules are restored.") If the rules successfully proscribe and prevent discrimination, there would be no need for the particular kinds of adjudications to which the State Associations object. See, e.g., U.S. v. Salerno, 481 U.S. 739, 745 (1987) (facial challenge to Bail Reform Act must establish that "no set of circumstances exists under which the Act would be valid.")

9/ See, e.g., Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies (Second NPRM), 16 FCC Rcd 22843, 22858 ¶50 (2001).

10/ The NAB got this partly right. See NAB October 29 Letter, p. 2 ("no court, in the absence of evidence of discriminatory practices, has relied entirely on statistical discrepancies to support a finding of discrimination.") Actually, statistical evidence, as in Teamsters, creates a prima facie case and shifts the burden to the respondent to explain how its extremely low employment of minorities or women could possibly have occurred without discrimination. Other evidence, though, is generally required in order to prove a discrimination case at trial.

11/ See, e.g., Florida NAACP v. FCC, 24 F.3d 271 (D.C. Cir. 1994), upholding Commission's refusal to hold a hearing where the only evidence of discrimination was statistics -- no minority hires and no minority recruiting. This was enough to "raise questions" about whether there was intentional discrimination, but the licensee had an explanation. Id. at 274.

12/ See, e.g., Rust Communications Group, Inc. (HDO), 53 FCC2d 355 (1975) (licensee hired no minorities; furthermore, its EEO program contained explicit anti-minority sentiments).

nor can it, how the FCC's acknowledgment of the proven fact that at least 15-24% of licensees discriminate would "unconstitutionally" pressure anyone to do anything, much less lead to an "FCC proceeding" in any individual case. Mere knowledge of the existence of widespread lawbreaking hardly "pressures" anyone to break the law in reverse,

Fourth, the State Associations and the NAB suggest that petitions to deny, which they imagine that civil rights organizations will file based entirely on statistical evidence of individual discrimination, will "put stations under precisely the sort of illicit pressure to hire minorities" that figured in Lutheran Church-Missouri Synod v. FCC, 141 F.3d 344,353, rehearing denied, 154 F.3d 487, rehearine en banc denied, 154 F.3d 494 (D.C. Cir. 1998)("Lutheran Church"). State Associations October 28 Letter, p. 2; see also NAB October 29 Letter, pp. 1-2. The State Associations also maintain that since the FCC "knows" that Form 395 data might be used to buttress discrimination complaints, the FCC would be "facilitating" "unconstitutional pressure that would thereby be created by third parties through underrepresentation complaints." State Associations October 28 Letter, p. 3. That interpretation of what the FCC has proposed, and of Lutheran Church, is entirely without merit.

a. In Lutheran Church, the court regarded the statistical test performed by the FCC as having had consequences for licensees -- that is, a licensee failing the test would have its recruitment program scrutinized more closely. By contrast, the FCC does not plan to use Form 395 data as a trigger for evaluating recruitment, and the FCC has indicated that it will immediately dismiss citizen complaints that are based on this theory. Further, if the FCC chooses to make Form 395 available "knowing" that the data in Form 395 might on rare occasions find its way into discrimination complaints, the FCC would hardly be unleashing citizen groups for an improper purpose. Instead, it would be making an impossible task -- proving discrimination when the discriminator can so easily conceal it -- slightly less impossible. 13/ When government gives citizens information that can help with law enforcement, government is not acting unlawfully, much less unconstitutionally.

b. In Lutheran Church, the FCC compared Form 395 data with workforce data that was not a test probative of discrimination, but instead was a test relevant to workplace diversity. By contrast, the Teamsters test compares an employer's hiring patterns with the employment of qualified minorities or women in the same market and the same jobs. The Teamsters test is aimed specifically at intentional discrimination. No party in this proceeding, including the NAB and the State Associations, suggests that the FCC should not have rules prohibiting intentional discrimination, although apparently the NAB and the State Associations want to deprive the FCC and the public of access to perfectly legitimate pieces of evidence of discrimination.

c. The 50% of parity test in Lutheran Church, without more, was said by the court to be sufficient to trigger closer FCC review of a renewal application. While statistical data is useful in an aggregate study of thousands of businesses in identifying the percentage of firms that are discriminators, statistical data in an individual case is only one piece of evidence useful to prove discrimination -- and it is usually a secondary piece of evidence at that.

Thus, the Teamsters test, which has been part of civil rights law for 25 years, bears none of the flaws of the Lutheran Church test.

Fifth, the NAB urges that Form 395 data is unnecessary because the Blumrosens Study reached conclusions about broadcasters' discrimination by using EEO-1 data. NAB October 29 Letter at 3. However, to effectively tailor its rules to industry realities, the Commission needs a full picture of its licensees' behavior over time. EEO-1 data was sufficient to show that discrimination is prevalent even among the largest broadcasters -- those subject to OFCCP requirements, those with the most transparency and with resources sufficient to hire professional personnel directors whose jobs include rooting out internal discriminatory behavior. Most broadcast cases involving

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13/ See EEO Supporters Comments, pp. 40-47 (explaining why it is so difficult to prove discrimination, particularly because discrimination is so easy to conceal).

discrimination have involved stations too small to file an EEO-1. The NAB does not suggest that only large broadcasters discriminate, or that a discrimination victim is any less injured when discrimination is visited on her by a small rather than a large firm.

Sixth, the State Associations object to the possibility that Form 395 data could be used in discrimination cases in non-FCC tribunals. See State Associations October 28 Letter, p. 2 n. 1. 14/ One would think that if at least 15-24% of the firms in an important industry are discriminating, trade organizations representing those firms would welcome any initiative that gives federal judges additional tools to clean up their industry. 15/ Furthermore, there is no public interest reason for one agency to withhold data from the public in order to prevent another tribunal from using that data for law enforcement. Imagine the Agriculture Department deciding not to publish individual firms' fertilizer usage data because the Department wants to prevent the EPA from knowing the individual sources of water pollution. Such a motivation would amount to nothing more than the naked protection of lawbreakers. 16/

Seventh, the State Associations rejected our suggestion that the Form 395 issue be severed from this proceeding. We urged the Commission to avoid the possible confusion that could result if Form 395, whose contents are not probative of recruitment violations, is made the subject of a proceeding that focuses almost entirely on recruitment mechanisms. See EEO Supporters Comments, pp. 135-36. Yet the State Associations now claim that the Commission cannot "lawfully sever" the Form 395 issue from the other issues in this proceeding because "resolution of those issues is inextricably intertwined with the core issue of how, if at all, broadcasters' conduct should be regulated." State Associations October 28 Letter, p. 3. That is not the case at all. Form 395 data is only one of many possible pieces of evidence relevant to whether the nondiscrimination portion of the proposed rules are being violated. There probably has never been a rule or a law adopted with a simultaneous and complete exposition of the type, weight, and nature of the evidence that would he considered in the future in individual adjudications. Indeed, Form 395 was originally created in May, 1970 -- eleven months after the substantive EEO rule was adopted. 17/

14/ The State Associations also suggest that petitions to deny might be filed "based on the pendency of' complaints in other forums. State Associations October 28 Letter, p. 2 n. 1. However, the mere "pendency of' a complaint in another forum is not grounds for FCC action. Instead, specific anecdotal evidence of discrimination produced in other tribunals may he probative of violations of the FCC's own rules, but it is quite far fetched to suggest that anyone would import Form 395 data to another forum and then re-export it back to the FCC.

15/ As we have pointed out, when some firms in an industry engage in discrimination, their behavior weakens the quality of the experienced labor pool drawn upon by nondiscriminating firms, thereby impeding nondiscriminators' competitiveness and the competitiveness of the industry vis-a-vis other industries. See EEO Supporters Comments, pp. 24-29. In the omnibus media ownership proceeding (MB Docket 02-277), many broadcasters will certainly maintain that other industries are competitive substitutes for broadcasting. If that is so, broadcasters should embrace every effort to strengthen their industry's competitiveness.

16/ We concur with NOW et al.'s analysis of this issue in its October 25, 2002 ex oarte letter to Commissioner Martin. As NOW points out, "those other forums, not the Commission, are responsible for determining what weight, if any, to give the data." Id., p. 2.

17/ Indeed, when the FCC first adopted its EEO rule, it did not include a data collection requirement. That came later. See Petition for Rulemakine to Reouire Broadcast Licensees to Show Nondiscrimination in Their Emolovment Practices (R&O), 18 FCC Rcd 240 (1969) (adopting EEO Rule) and the simultaneously issued Petition for Rulemakine to Reauire Broadcast Licensees to Show Nondiscrimination in Their Employment Practices (Further NPRM), 18 FCC Rcd 249 (1969) (seeking comments on reporting and recordkeeping requirements). At the conclusion of the further rulemaking, Form 395 was created. Petition for Rulemakine to Require Broadcast Licensees to Show Nondiscrimination in Their Employment Practices (R&O), 23 FCC Rcd 430 (1971).

Eighth, the State Associations suggest that if the Commission is not prepared to decide the Form 395 issue now, the Commission should "postpone any action in this proceeding" until it can deal with *"all* relevant issues." State Associations October 28 Letter, p. 3. That would not solve the problem of having Form 395 in the wrong docket; further, it would delay even longer the day when EEO rules are restored and the public receives some measure of prevention of discrimination. With 42% of the job postings on state associations' websites going out of their way not any longer to hold out the employer as an "equal opportunity employer", and with at least 15%-24% of the largest broadcasters discriminating against minorities or women, the time for action has arrived.

Whenever Dr. King was asked "how long?" before freedom would come, he always answered "not long." We pray that new rules will be adopted "not long" from now.

Sincerely,

David Honig
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